ESTATE OF PATRICK CHURCH, JR.	: Order Affirming Decision and : Remanding Case : : Docket No. IBIA 94-83 : : August 1, 1994

Appellant Richinda M. Adams seeks review of a February 23, 1994, order denying rehearing issued by Administrative Law Judge Harvey C. Sweitzer in the estate of Patrick Church, Jr. (decedent). For the reasons discussed below, the Board of Indian Appeals (Board) affirms that order, but remands this case for further consideration in accordance with this opinion.

Decedent, Oglala Sioux OSU-29372, died intestate on August 16, 1992. No one appeared at the November 18, 1993, hearing to probate decedent's trust or restricted estate. Based on the evidence presented by the Bureau of Indian Affairs (BIA), on December 28, 1993, Judge Sweitzer determined that decedent's sole heir was his father, Patrick B. Church, Sr., a non-Indian. It appears that all of decedent's estate, except for $29.82 in an Individual Indian Money account, escheated to either the Standing Rock Sioux Tribe or the 0glala Sioux Tribe under the provisions of the Indian Land Consolidation Act, 25 U.S.C. § 2206 (1988) (ILCA). 1/

Appellant, decedent's sister, filed a petition for rehearing in which she alleged that she was informed by the Pine Ridge Agency, BIA (Agency), that the probate hearing would be held in Ohio, and that because Patrick Sr. had died on July 27, 1993, she was decedent's only heir. On February 23, 1994, Judge Sweitzer denied rehearing on the grounds that, under South Dakota laws of intestate succession, a parent inherited before a sibling. The Judge acknowledged that Patrick Sr. died before the hearing, but concluded that decedent's estate had passed to Patrick Sr. at the time of decedent's death, when Patrick Sr. was still living.

On appeal, appellant again raises the two arguments she made in her petition for rehearing and adds a constitutional challenge to ILCA's escheat provisions.

1/ All further citations to the United States Code are to the 1988 edition.

Concerning the distribution of decedent's property, the Judge's order states: "As to interests in property not subject to the provisions of the Indian Land Consolidation Act, as amended, if any there be" (Emphasis added). The probate record does not show any interests in trust real property held by decedent that were not subject to escheat under ILCA.

Based on the evidence in the record and appellant's filings, the Board affirms the Judge's denial of appellant's petition for rehearing on several grounds: (1) the Judge correctly held that inheritance is determined as of the time of the decedent's death, so that Patrick Sr. would still inherit even though he died before the probate hearing; (2) appellant was notified of the time and location of the hearing, but chose not to attend or to inform the Judge of any problem with the location; 2/ and (3) the Board lacks jurisdiction to address appellant's constitutional arguments against escheat (Estate of Josephine Ruth Bergeron Whitaker, 23 IBIA 147 (1993), and cases cited therein).

Despite the Board's conclusion that rehearing was properly denied, appellant's notice of appeal raises allegations which the Board cannot ignore in exercising the inherent authority of the Secretary to correct manifest injustice or error. 3/ Appellant alleges that she presented to BIA a document which purported to be decedent's will, but the document "was disregarded" because it was signed by only one attesting witness. She further states that this will mentioned two children of decedent, but that she has not been able to locate these children because decedent was vague in describing them.

The notice of hearing sent to appellant stated that no will had been located for decedent. In October 1993, Judge Sweitzer sent appellant and/or her father information provided by BIA concerning decedent's family history, specifically asking whether decedent had made a will or had any children. Although Patrick Sr. was already deceased when this information was mailed, the record does not contain a response from appellant. Statements made in

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2/ The probate record does not contain any correspondence or record of other communication from appellant to either Judge Sweltzer or Judge Robert Yetman, who issued the order setting the hearing, prior to appellant's filing of her petition for rehearing. The order scheduling the hearing stated that the hearing would be held in Rapid City, South Dakota, and gave the proper mailing address for the Judge's office in Rapid City.

In her petition for rehearing appellant states that when she received the notice of hearing, she contacted the Agency about the hearing location, but received no response. Appellant should have contacted the Judge who isiued the order to which she was objecting, not BIA. BIA was not required to act on or respond to appellant's communication because the matter was before the Judge and BIA could reasonably believe that appellant would also have contacted the Judge.

In her notice of appeal to the Board, appellant states that she made her request for a change in the hearing location to "the Dept. of Interior, in Rapid City." However, as noted, the record contains no evidence of any communication by appellant to either Judge Sweitzer or Judge Yetman.

3/ 43 CFR 4.318 provides:

"An appeal shall be limited to those issues which were before the administrative law judge upon the petition for rehearing * * *. However, except as specifically limited in this part * * * the Board shall not be limited in its scope of review and may exercise the inherent authority of the Secretary to correct a manifest injustice or error where appropriate."

appellant's petition for rehearing show that she received the request for information. Appellant first mentioned her knowledge of the possible existence of a will and children of decedent in her notice of appeal to the Board. Under these circumstances, the Board is skeptical about the existence of either a will or children of decedent.

However, it is possible that appellant presented some document to the Agency. If so, that document should have been made a part of the probate record and included in the materials transmitted to the Judge, whether or not it appeared to be a valid will, because the authority to determine the validity of a document purported to be a will rests with the Judge. See 43 CFR 4.202.

The absence of this document becomes especially important because appellant alleges that in it decedent acknowledged paternity of two children. It appears most likely that decedent had no interests in real property that he could legally devise under ILCA to any children he may have had. However, 25 U.S.C. § 2206(b) provides that a person may devise interests in property that would otherwise escheat "to any other owner of an undivided fractional interest in such parcel or tract of trust or restricted land." Although it is a remote possibility, if the document appellant alleges she presented to BIA actually exists, it might be valid as decedent's will and his children might own an interest in some or all of his trust properties. If so, escheat as to those interests would be defeated.

Under these circumstances, the Board concludes that the Department's trust responsibility requires further inquiry into the possible existence of a will and children of decedent.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, Judge Sweitzer's February 23, 1994, order denying appellant's petition for rehearing is affirmed, but this case is remanded for the taking of additional evidence concerning the possible existence of a will and children of the decedent.

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Kathryn A. Lynn
Chief Administrative Judge

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Anita Vogt
Administrative Judge